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No. 07-694

In the

FILED
FEB 6 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

Todd Guthrie

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for
the Ninth Circuit

PETITION FOR REHEARING

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1. The U.S. is subjecting members of the public to penalties for failure to provide answers to questions made by Form such as the 1040, failing to inform members of the public with their questions, the reasons the questions are being asked, the way the answers given are intended to be used, and this Court should rehear this matter and settle the division of the Circuits caused by the U.S. non unified position in favor of this Court's long standing position that tax forms are subject to the same public protections Congress directs all requests to be subjected to in the same way questions would be treated if they were being asked orally by the Agency. 3

2. Rehearing by this Court should be granted because until this Court fixes the division of the Circuits caused by this Court's Dole decision, the public will continue to lose their right to vote, hold property, petition for redress, and freely speak, all penalties to which the Paperwork Reduction Act was enacted to prohibit. 13

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INTRODUCTION

Petitioner asks this Court to reconsider the holding in *Dole v. United Steelworkers*, 494 U.S. 26,33 (1990) that typical information collection requests are tax forms such as the 1040 and reaffirm this holding applies to the Paperwork Reduction Act of 1995 as it did the Act of 1980. Since holding tax forms are subject to the public protection, 44 U.S.C. § 3512(1980), a division of the U.S. Circuit Courts and Tax Court has appeared, both directly after the Dole decision, and now this division has grown to such proportions that the Department of Justice is promoting the divided authority as a green light to continue to disregard Congress and its mandate that all persons are to be told, before they have to answer any questions, orally or in writing, advanced by any Agency, including the Internal Revenue Service, why the Agency is requesting the information sought on their form, how the answers to those questions are intended

to be used, whether the target's response is voluntary or mandatory, and the fact no person is required to answer any question unless the form of questions displays compliance with the Paperwork Reduction Act of 1995(during Dole, 1980).

Even if this Court is unwilling to consider the affect the Paperwork Reduction Act of 1995 has on its 1990 Dole decision, which Congress said was intended to overturn the Dole decision in regard to third party requests not being covered by the 1980 Act's public protection, the fundamental principal that no person should be required to provide answers to questions until that person fully understands the conditions which attach to the usage of those answers must be addressed because there is no way a person can know whether to claim the protection of the Fifth Amendment until such time as the Agency seeking the information has fully disclosed its intentions for the information it seeks.

1. The U.S., in subjecting members of the public to penalties for failure to provide answers to questions made by Form such as the 1040, fail to inform members of the public with their questions, the reasons the questions are being asked, the way the answers given are intended to be used, and this Court should rehear this matter and settle the division of the Circuits caused by the U.S. non unified position in favor of this Court's long standing position that tax forms are subject to the same public protections Congress directs all requests to be subjected to in the same way questions would be treated if they were being asked orally by the Agency.

On November 14, 2007, the 7th Circuit Court of Appeals issued its decision in U.S. v. Denny R. Patridge, case number 06-3635.In its consolidated decision, the 7th Circuit stated it was reaffirming its decision in *Salberg v. U.S.*, 969 F.2d 379, 384 (1991), which held the "obligation to file a tax return stems from 26 U.S.C. § 7203, not from any agency's demand. The Paperwork Reduction Act does not repeal § 7203."

The 9th Circuit in U.S. v. Priest, et al., 06-10438, decided July 5, 2007, likewise concluded that the 1995 PRA "does not limit the impact of Hicks (947 F. 2d 1356, 1359-60) because we there held that 'repeals by implication are not favored.'"

The 7th and 9th Circuit's decision are contrary to this Court's holding in *CIR v. Lane Wells Co.* 321, U.S. 219, 223 (1944) that "Congress has given discretion to the Commissioner to prescribe by regulations forms of returns and made it the duty of the taxpayer to comply."

The 7th and 9th Circuit opinions also are contrary to this Court's decision in *Dole v. United Steelworkers*, 494 U.S. 26, 33 (1990) which held "typical information collection requests include tax forms" and that the public is to be protected.

The 7th and 9th Circuit's opinion is also contrary to this Court's decision in *U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) which held "incriminating evidence may be the by-product of obedience to a regulatory requirement."

The decision by the 7th and 9th Circuits completely rejected the direct words of the Paperwork Reduction Act of 1980 and 1995 which both begin at section 3512 "Not withstanding any other provision of law no person shall be subject to any penalty..." The 7th Circuit admits the term "return" is not defined by any Act of Congress and ignores the logical follow that is the request derives from regulations.

The 7th Circuit takes the leap by saying they have "no doubt that the IRS has complied with the Paperwork Reduction Act." "The control number on Form 1040 appears on OMB's web site as a current, valid number; if this is wrong, it takes more than a lawyer's say-so to establish the proposition."

The 7th Circuit's position is contrary to the direct language of the Paperwork Reduction Act of 1995 as well as this Court's decision in Dole. The 1995 Act directs a "complete defense, bar, or otherwise" may be raised at any time. The

protection would begin upon either a person's "say-so" or upon an Attorney claiming the protection for his client. Look at how the 7th Circuit handled the issue.

It threatened disbarment of the Patridge Attorney for raising the protection. There is no doubt the Form 1040 fails to contain any of the listed criteria promulgated by Congress at 44 U.S.C. § 3506(c)(1)(B)(1995) which among other things directs the Agency to inform the target the reason why the questions are being asked and how the information is to be used. Issues the Patridge Panel completely ignored.

See also 5 U.S.C. §552(a) where Congress requires the same list of disclosure for the IRS as section 3506(c)(1)(B) of Title 44.

This Court said in Dole:

> "While the grammar of this text can be faulted, its meaning is clear: **the public is protected under the Paperwork Reduction Act** from paperwork regulations not issued in

> compliance with the Act, only when those regulations dictate that a person maintain information for an agency or provide information to an agency. **By its very terms, the statute's enforcement mechanism** does not apply to rules which require disclosure to a third party rather than to a federal agency." Id. at 40

Furthermore, the Patridge panel said "How any of this could block a conviction for tax evasion is a mystery."

The 10th Circuit has steadfastly remained[1] a strong proponent of the Dole holding with their most recent deposit on the reach of protection for the public in *USA v. Chisum*, 06-7082 at 12 (slip op.)(decided 9-26-07)(10th Cir.)

In 2007, the Chisum Panel held:

C. The Paperwork Reduction Act (PRA)

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[1]Petitioner understands thus far the Tenth Circuit has actually given no relief under the 1980 or 1995 Act while they continue to direct where and when such relief is to be given.

The PRA, 44 U.S.C. § 3501-20, precludes the imposition of any penalty against a person for "failing to comply with a collection of information" if either (1) it "does not display a valid control number" or (2) the agency fails to alert the person that he or she "is not required to respond to the collection of information unless it displays a valid control number." 44 U.S.C. § 3512(a). A § 3512(a) defense may be raised at any time. See id. § 3512(b). Tax forms are covered by the PRA. See Dole v. United Steelworkers of Am., 494 U.S. 26, 33 (1990).

Mr. Chisum contends that "[s]ince there was no proof that Form 1040 was a lawful form under the [PRA], the trial court erred in failing to grant [his] request [at the sentencing hearing] to dismiss the indictment." Aplt. Br. at 29. But the PRA protects a person only "for failing to file information. It does not protect one who files information which is false." Collins, 920 F.2d at 630 n.13 (internal quotation marks omitted). The charges against Mr. Chisum were predicated on the filing of false information, not the failure to file. He

is therefore not entitled to relief.

In *U.S. v. Collins*, 920 F.2d 619 (10th Cir. 1990) the 10th Circuit, prior to the 7th Circuit's decision in Salberg, stated

> [fn12]In *U.S. v. Tedder*, 787 F.2d 540, 542 (10th Cir. 1986), this court held that tax forms were not information collection requests subject to the Paperwork Reduction Act because the filing of income tax returns was obligatory. **This holding[2] is superseded by the Supreme Court's analysis in Dole v. United Steelworkers,** ___ U.S. ___, 110 S.Ct. 929, 933, 108 L.Ed.2d 23 (1990), which included federal income tax forms within the category of information collection reque: under the Act. Dole would also appear to call into question the holdings in Snyder v. IRS, 596 F. Supp. 240 (N.D.Ind. 1984) and Cameron v. IRS, 593 F. Supp. 1540 (N.D.Ind. 1984), aff'd 773 F.2d 126 (7th Cir. 1985), both of which held the Paperwork Reduction Act inapplicable to IRS

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[2]No doubt Dole is a "Holding."

forms. However, Dole does not contravene our recent holding in Lonsdale v. U.S., 919 F.2d 1440, 1444 (10th Cir. 1990) that IRS summonses do not constitute information requests under the Act because they are issued in the course of an investigation directed against a specific individual or entity. See 44 U.S.C. § 3518(c)(1)(B)(ii).

[fn13] In U.S. v. Weiss, 914 F.2d 1514, 1520-22 (2d Cir. 1990), the Second Circuit held that the Paperwork Reduction Act did not preclude prosecution for filing false medicare and Medicaid claims, despite the fact that the forms in question did not contain OMB control numbers. Distinguishing Smith, where defendants were prosecuted for failure to file a Plan of Operations with the Forest Service, the Second Circuit reasoned that the Act "`only protects a person from penalties for failing to files information It does not protect one who files information which is false.'" Id. at 1522 (quoting Funk, The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law, 24 Harv.J. on Legis. 1, 77 n. 411 (1987))

> (emphasis in original). We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information. Had defendant's tax evasion been effectuated through the filing of falsified tax returns, Weiss would dictate that no Paperwork Reduction Defense would be available to him. **But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct.** Emphasis added.

Petitioner claims the Chisum Panel[3] is partly incorrect. The Chisum Panel nine months earlier held in *Pond v. CIR*, T.C. Memo 2005-255 WL 18928, decided January 4, 2007, Tax Court was wrong for directing Pond, by raising a defense against penalty and interest claims of the Secretary, he was acting in a frivolous manner.

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[3]Same 10th Circuit but different Judges.

The 7th Circuit in Patridge says it cannot understand how "tax evasion" and the public protection provision of the Paperwork Reduction Act are connected, describing this as a "mystery" while the 10th Circuit says Forms like the 1040 are "inexorably linked to the statutory requirement to pay taxes..." Collins, fn13, Chisum, pg. 12

The 1980 Act at issue in Collins and Dole protected the public from penalties for failing to maintain or provide information while the 1995 Act protects the public from failing to comply with a collection of information. The 1995 Act also says the OMB number must be issued in "accordance with this chapter" and defense, bar or otherwise, can be raised at any time.

Simply, the decisions show why this Court needs to address the reach of the public protection provided by Congress to the entire Country at 44 U.S.C. § 3512(a)(1995).

Then there is the Tax Court's refusal to accept the 10th Circuit's decision in Pond v. CIR.

See *Wolcott v. CIR*, T.C. Memo. 2007-315. (fn.8)

The relationship between Government and the Public involving gathering information and usage of same is in need of specific uniform enforcement, and to which blatant error of Constitutional proportion exists in the refusal of the U.S. Department of Justice, Commissioner of I.R.S., U.S. Tax Court and the several U.S. Court of Appeals, in rejecting both the law, history and decisions governing the Paperwork Work Reduction Act of both 1980,1995, and the reasons both acts arose in the first place. With many violations comes many cases which can be prevented by granting this Petition for rehearing.

2. Rehearing by this Court should be granted because until this Court fixes the division of the Circuits caused by this Court's Dole decision, the public will continue to lose their right to vote, hold property, petition for redress, and freely speak, all penalties to which the Paperwork Reduction Act was enacted to prohibit from being confiscated from any member of the public.

The 7th Circuit says the requirement to answer questions on Form 1040 comes from 26 U.S.C. § 7203 in both Patridge and Salberg. Section 7203 is a criminal provision. This makes the 7th Circuit's theory that the IRS, by asking the public to answer their questions on the 1040, not only is the IRS conducting an investigation with the 1040, but a criminal investigation at that.

In *Pennsylvania* v. *Muniz*, 496 U.S. 582, 596 (1990) this Court explored short of the "outer boundaries of what is 'testimonial'" and that the protection primarily was to prevent "a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality..." *Ullmann* v. *U.S.*, 350 U.S. 422, 428 (1956) This Court went on to say "it is evident that a suspect is 'compelled . . . to be a witness against himself' at least whenever he must face the modern-day analog of the historic trilemma[4] - either during a criminal trial where a

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[4]cruel trilemma means self-accusation, perjury or contempt, defining the operation of the

sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in Miranda, the choices are analogous and hence raise similar concerns." Id.

In *Colorado v. Spring*, 479 U.S. 564 (1987) this Court compared the "right to refuse to answer any question which might incriminate," citing *U.S. v. Washington*, 431 U.S. 181, 188 (1977) and directed it was "self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." Ibid.

There, It was said a "valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that 'might . . . affec[t] his decision to confess.' *Moran v. Burbine*, 475 U.S., at 422. This

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Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.

Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Colorado at 577 In regard to an Agency request for information, Congress has made this requirement through the Paperwork Reduction Act of both 1980 and 1995 very clear.

If a Federal Agency refuses to tell a person why they are asking questions of any citizen or group of citizens and how that agency intends to use those answers, the only choice remaining for members of the pubic is the act of remaining silent without threat or being "subject" to any penalty.

In *U.S. v. Dawes*, 951 F.2d 1189 (fn.2)(10th Cir. 1991), the 10th Circuit reported on the troubling aspect of not enforcing the Paperwork Reduction Act in a unified manner, the Court stated:

> "In response to a question from the court during oral argument, counsel for the government indicated that the government did not have a unified federal position regarding this issue. Given the fact that the issue is one of national scope which affects the tax revenues of the U.S., we find this posture regrettable."

The same problem exists today as depending on which Circuit you live in determines whether you can be penalized for remaining silent or not.

In *Garner v. U.S.*, 424 U.S. 648 (1976) this Court started with "the fundamental proposition:

> A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." quoting *Kastigar v. U.S.*, 406 U.S. 441 (1972).

Id. at 656

The Court has held that an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege. *U.S. v. Kordel*, 397 U.S. 1, 7-10 (1970).

Given the evidence the U.S. is refusing to recognize or direct compliance with the 1995 Paperwork Reduction Act, continuing to emphasize the Paperwork Reduction Act of 1980 instead, and that a deep divide exists between the 7th Circuit in Patridge and Salberg with the 10th Circuit in Collins, Dawes, Pond and Chisum, as well as the Tax Court's public display of defiance to the 10th Circuits Pond decision it reported in Wolcott, as well as such blatant defiance by the 7th Circuit and Tax Court for this Court's decision in Dole and Congressional mandates within the Paperwork Reduction Act of 1995, should compel this Court to rehear the matters in this case.

CONCLUSION

For the foregoing reasons Petitioner asks this Court to Grant his Petition for Rehearing.

Respectfully Submitted

2-3-08 /s/Todd Guthrie

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Petition for Rehearing is presented in good faith and not for the purpose of any delay, whatsoever, and is limited to substantial and controlling issues involving recent decisions by the 7th, 9th and 10th Circuit, which divide this nation on the application and reach of the Paperwork Reduction Act of 1995 and the fifth amendment tones remaining silent may trigger only strengthening why this Court should Grand this Petition for Rehearing.

/s/Todd Guthrie